



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 27, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-325

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council ("Council") considered the October 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint: the Custodian had not denied access to any records responsive to the Complainant's September 10, 2014, OPRA request, because the Custodian did not receive the Complainant's request until September 15, 2014. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired. The instant complaint is therefore materially defective and should be dismissed. See Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009); N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011).
2. The Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, this complaint was not ripe for adjudication because the Complainant filed same prior to the expiration of the statutorily mandated time frame and absent a response from the Custodian. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 27th Day of October, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-325

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of any and all e-mails and/or correspondence between the Franklin Fire District No. 1 (“FFD”) Commissioners, administrative aides, and Custodian’s Counsel related to the hiring of Counsel and/or his law firm from July 30, 2014, to noon on August 11, 2014.

Custodian of Record: Tim Szymborski

Request Received by Custodian: September 15, 2014

Response Made by Custodian: September 24, 2014

GRC Complaint Received: September 23, 2014

Background³

Request and Response:

On September 10, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Complainant received an automatic reply alerting him to the Custodian’s absence until after September 14, 2014.

Denial of Access Complaint:

On September 23, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he never received a response to his OPRA request. The Complainant thus requested that the GRC: 1) determine that the Custodian violated OPRA by failing to provide all responsive records within seven (7) business days; 2) order immediate disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thereby warranting an assessment of the civil

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

penalty; 4) determine that the Complainant is a prevailing party, entitled to an award of reasonable attorney's fees and; 5) order any further relief it deems to be reasonable.

Supplemental Submissions:

On September 23, 2014, the Custodian's Counsel e-mailed the Complainant, advising that he is aware that the Complainant filed this complaint. The Custodian's Counsel stated that the subject request, dated September 10, 2014, was not received until September 15, 2014. The Custodian's Counsel stated that the statutorily mandated time frame had not yet expired at the time of the filing of this complaint. The Custodian's Counsel therefore demanded that the Complainant withdraw the complaint and further put the Complainant on notice that the FFD will seek reimbursement for fees associated with defending itself.

The Complainant's Counsel responded, asserting that the Complainant submitted his OPRA request on September 10, 2014, and had until September 19, 2014, to respond. The Complainant's Counsel stated that for this reason, the complaint would stand as submitted.

On September 24, 2014, the seventh (7th) business day after the Custodian's alleged receipt of the OPRA request, the Custodian's Counsel responded in writing on behalf of the Custodian by providing access to responsive records. Additionally, the Custodian's Counsel addressed Complainant's Counsel's timeliness argument (*citing* N.J.S.A. 47:1A-5(i); Alexander v. NJ Dep't of Corrections, GRC Complaint No. 2014-70 (April 2014)(administratively disposing of the complaint as unripe for adjudication)). The Custodian's Counsel also noted that the GRC's training material provides that the time frame does not begin until a custodian receives the request. The Custodian's Counsel stated that the Complainant received an out-of-office message and was well aware of the Custodian's absence through September 14, 2014. Consequently, the Custodian's Counsel again requested that the Complainant withdraw the complaint, contending that defending a clearly unripe case where the FFD had timely complied would be a waste of taxpayer money.

Statement of Information:

On October 3, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 15, 2014, upon his return from a convention in Wildwood. The Custodian certified that he utilized the FFD's information technology ("IT") vendor to retrieve responsive e-mails, contacted the individuals identified in the request, and searched the FFD's office records. The Custodian certified that Custodian's Counsel responded in writing on his behalf on September 23, 2014, and again on September 24, 2014, providing access to the responsive records.

The Custodian argued that the complaint was unripe for adjudication at the time of filing, contending that the statutorily mandated time frame had not yet expired and that no denial of access had occurred. The Complainant certified that he submitted his OPRA request via e-mail to only the Custodian and received the automatic reply, advising that he would be away until after September 14, 2014. The Custodian certified that he received the OPRA request on September 15, 2014, and believed the last day to respond was September 24, 2014. At that time, the

Custodian endeavored to coordinate a search for responsive records. The Custodian argued that notwithstanding the foregoing, the Complainant filed the instant complaint. The Custodian noted that the FFD provided the Complainant two (2) opportunities to withdraw the complaint, claiming that the complaint is both unripe and frivolous. However, the Complainant refused. The Custodian argued that he believes the FFD acted properly under OPRA and requested that the GRC award the FFD attorney's fees.⁴

The Custodian's Counsel submitted a legal certification to corroborate the Custodian's statements about the calculation of the statutory time frame. Additionally, the Custodian's Counsel certified that the Custodian contacted him upon receipt of the OPRA request to discuss same. Additionally, the Custodian's Counsel certified that the Custodian forwarded him the instant complaint soon after receipt for advice and a response. The Custodian's Counsel noted that both OPRA and the GRC's training materials support that the time frame does not start until the custodian receives the OPRA request.

Additional Submissions:

By letter dated October 18, 2014, the Complainant's Counsel argued that the issues presented here are straightforward: the Custodian was away and did not make provisions to have the FFD's officially designated sub-custodian handle requests in his absence. The Complainant's Counsel also contended that the Custodian's SOI certifications prove that the "deemed" denial was deliberate and intentional.

Regarding the Custodian's failure to assign a sub-custodian in his absence, the Complainant's Counsel asserted that the GRC has held that custodians are obligated to designate someone to handle OPRA requests when they are out of the office or otherwise unable to respond to same. See Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (July 2012). The Complainant's Counsel also noted that the GRC previously determined that an OPRA request was "deemed" denied, notwithstanding the custodian's absence due to a vacation. Halper v. Twp. of Piscataway, GRC Complaint No. 2004-130 (December 2004).

The Complainant's Counsel argued that the Custodian unreasonably hampered access by way of his automatic reply and by his failure to provide instructions on contacting the sub-custodian. The Complainant's Counsel contended that the FFD relied on GRC training material to argue that the time begins upon a custodian's receipt of an OPRA request. However, Complainant's Counsel asserted that the FFD ignored the fact that the material also notes that another employee should be designated to receive and respond to OPRA requests in a custodian's absence. The Complainant's Counsel contended that the delivery and receipt of the OPRA request occurred at the moment the Complainant received the automatic reply and that all material and case law supports that the Custodian violated OPRA by failing to respond by close of business on September 19, 2014.

⁴ The GRC notes that the prevailing party provision in OPRA only applies to a complainant represented by an attorney. N.J.S.A. 47:1A-6; Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). For that reason, the GRC has no authority to award fees to public agencies. However, the public agency might have recourse in the Superior Court.

The Complainant's Counsel argued that the Custodian's actions and SOI arguments are problematic, given that he knew he would be away and never designated another employee to handle OPRA requests. The Complainant's Counsel then argued that the FFD designated (by resolution) Commissioner James Wickman as its sub-custodian on March 4, 2014.⁵ The Complainant's Counsel noted that the automatic reply, however, did not include instructions on how to submit the request to a sub-custodian. See Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (July 2008)(holding that the custodian's failure to indicate the specific lawful basis for not disclosing records was insufficient).

Further, the Complainant's Counsel argued that the Custodian was attending a fire district convention in Wildwood, which establishes that the Custodian was on official business. The Complainant's Counsel argued that the GRC could easily determine whether the Custodian received and or responded to any e-mails by requiring him to submit for *in camera* review any e-mails from September 10, 2014, to September 15, 2014. The Complainant's Counsel contended that the Custodian's official phone records prove he used his FFD issued smartphone on numerous occasions during that time frame.

Regarding the Custodian's "deliberate" denial here, the Complainant's Counsel argued that the GRC has continuously found violations of OPRA in previous complaints against the FFD. The Complainant's Counsel thus argued that the Custodian could not claim ignorance of his legal obligations under OPRA. The Complainant's Counsel contended that the Custodian's violation here should be viewed in light of past cases. See Blanchard v. Rahway Bd. of Educ., GRC Complaint No. 2003-75 (October 2003).⁶

The Complainant's Counsel next asserted that the Custodian failed to address whether he conducted a search for any correspondence (*i.e.*, text messages, letters, faxes, *etc.*). The Complainant's Counsel contended that, given his past "well-documented" denials of access to records, the Custodian deliberately failed to inquire with the identified individuals about other types of correspondence. The Complainant's Counsel further argued that the Custodian provided no evidence supporting when and how he contacted the individuals, nor did he provide supporting evidence as to the individuals' responses.⁷

The Complainant's Counsel thus requested that the GRC: 1) determine as a matter of policy that a custodian's out-of-office message is an insufficient response to an OPRA request; 2) require a custodian to include in an out-of-office reply the identity of a sub or interim custodian; 3) order the Custodian to certify to the actual search he conducted to locate and obtain

⁵ As part of arguments submitted in an earlier matter, the Complainant's Counsel also acknowledged the Complainant's awareness that the FFD had previously designated Don Bell as "Deputy Custodian." See Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 20, 2014), at 6.

⁶ The Council previously addressed this issue in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-158 *et seq.* There, the complainant's counsel sought reconsideration, arguing that the Council should have taken into account the custodian's past actions when determining whether he knowingly and willfully violated OPRA. Although the GRC initially employed a tool to track such actions (the "Matrix"), the Council discontinued its use at its November 10, 2005, meeting. Thus, the GRC will not address the issue.

⁷ The Complainant's Counsel also argued that the Custodian failed to provide "immediate access" records immediately. However, the Complainant's OPRA request did not seek "immediate access" records, as identified in N.J.S.A. 47:1A-5(e); therefore, the GRC will not address the issue.

records from the individuals identified in the OPRA request; 4) order an *in camera* review of any e-mails sent and received from the Custodian's e-mail account during his absence from the FFD and up until September 15, 2014; 5) refer this complaint to the Office of Administrative Law for a knowing and willful hearing; and 6) order any further relief it deems to be reasonable.

On September 8, 2015, the GRC sought additional information from the Custodian. Specifically, the GRC advised that it was unclear from the evidence of record whether the Custodian attended convention in Wildwood on a personal basis or on official business as a representative of the FFD. Thus, the GRC requested that the Custodian submit a legal certification answering the following:

1. Did the Custodian attend the convention in Wildwood on official FFD business?

The GRC required the Custodian to submit his legal certification and any supporting documentation by close of business on September 11, 2015.

On September 10, 2015, the Custodian certified that his attendance at the convention was considered official business. The Custodian certified that, as one (1) of the five (5) FFD Commissioners empowered with a vote to make decisions on behalf of same, the annual convention allows him to network with various equipment vendors and inform the other Commissioners of his findings. Additionally, the Custodian certified that attendance expenses for the convention were budgeted and approved by the FFD through its annual budget process.

On October 19, 2015, the GRC sought additional information from the Custodian based on his September 10, 2015, legal certification. Specifically, the GRC advised that it was unclear from the evidence of record whether the Custodian linked his e-mail account to his smartphone and, if so, whether he actively checked his e-mail while at the convention. Thus, the GRC requested that the Custodian submit a legal certification answering the following:

1. Is the Custodian's FFD e-mail account linked to his smartphone?
2. Is so, did the Custodian view the Complainant's OPRA request on his smartphone while attending the convention in Wildwood, NJ?

The GRC required the Custodian to submit his legal certification and any supporting documentation by close of business on October 22, 2015. On October 19, 2015, the Custodian responded to the GRC's request for additional information by certifying that his FFD e-mail account is not linked to his smartphone; therefore, the Custodian had no way of viewing the Complainant's OPRA request from the convention.

Analysis

Unripe Cause of Action

OPRA provides that "a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than *seven business days after receiving the request . . .*" N.J.S.A. 47:1A-5(i) (emphasis added). OPRA further states that "[a] person who is denied access to a government record by the

custodian of the record . . . may institute a proceeding to challenge the custodian's decision by filing . . . a complaint with the Government Records Council . . ." N.J.S.A. 47:1A-6.

In Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian, and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The custodian argued in the SOI that the complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5(i). The Council held that:

[B]ecause the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.

Id.; *see also* Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012).

Prior to making a determination as to whether the Custodian unlawfully denied access to any records, the GRC must review and determine whether this complaint is ripe for adjudication. Specifically, there is a question of whether the Complainant filed this complaint prior to the expiration of the statutorily-mandated response time without the Custodian responding to the subject OPRA request.

In the instant matter, the Complainant argued that the Custodian violated OPRA by failing to respond within seven (7) business days from the date he submitted same via e-mail. Thereafter, in an October 18, 2014, letter brief, the Complainant's Counsel asserted that the Council previously determined that custodians were obligated to designate sub-custodians in their absence (*citing* Halper, GRC 2004-130, and Colasante, GRC 2010-18). Counsel also argued that the Custodian's away message unreasonably delayed access because it failed to direct the Complainant to the designated sub-custodian. The Complainant's Counsel thus requested that the GRC determine that replies from out-of-office messages are insufficient. Yet, Custodian's Counsel also asks the GRC to require out-of-office messages to include instructions on contacting the sub-custodian. The Complainant's Counsel also noted that the Custodian utilized his smartphone during the convention many times. Counsel asserted that the Council could easily determine whether he actually read the Complainant's OPRA request for the first time on September 15, 2014, by reviewing *in camera* all e-mails the Custodian sent and/or received from the moment he set up his out-of-office message until he claimed to have received the subject OPRA request.

Conversely, the Custodian certified in the SOI that he was away at a convention and did not receive the Complainant's OPRA request until he returned on September 15, 2014. The Custodian asserted that this complaint was not ripe for adjudication because the last day to respond was September 24, 2014. However, the Custodian subsequently certified that he attended the convention on official FFD business.

The GRC's case law consistently supports that the statutorily mandated response time frame begins the day after the custodian's receipt of an OPRA request. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011). The GRC has memorialized this calculation in its training material, which is available on the GRC's website. See "A Citizen's Guide to [OPRA]" (2nd Edition – July 2011); "Handbook for Records Custodians" (5th Edition – January 2011).

Based on the evidence presented here, the threshold issue is whether the Custodian, while at the convention on official FFD business, viewed the subject OPRA request on his smartphone prior to returning to the FFD on September 15, 2014. The evidence of record supports that the Custodian used his smartphone to make and receive telephone calls while he was in Wildwood on FFD business. However, the Custodian also certified that his FFD account is not linked to his smartphone. Based on the foregoing, the evidence supports that the Custodian did not actually receive the Complainant's OPRA request until September 15, 2014.

Accordingly, the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint: the Custodian had not denied access to any records responsive to the Complainant's September 10, 2014, OPRA request, because the Custodian did not receive the Complainant's request until September 15, 2014. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired. Based on the foregoing, the instant complaint is materially defective and should therefore be dismissed. See Sallie, GRC 2007-226; N.J.S.A. 47:1A-5(i); Kohn, GRC 2009-289.

Finally, the GRC will briefly address the remaining issues raised by the Complainant's Counsel.

Designation of a Sub-Custodian

The Council previously reviewed this issue in Paff v. NJ Dep't of Law & Pub. Safety, NJ State Police, GRC Complaint No. 2010-126 (September 2011). There, the Council noted that the facts highlighted a public agency's obligation to continue responding to OPRA requests in the absence of the custodian. The Council noted that OPRA does not address situations where custodians are unavailable; "[t]hus, best practices dictates that if a custodian is to be unavailable for an extended amount of time, another employee should be designated to accept and respond to OPRA requests in his/her stead for the duration of his/her absence." Id. at 9. However, the Council declined to determine that the custodian violated OPRA.

Here, the Complainant's Counsel cited to Halper, GRC 2004-130, and Colasante, GRC 2010-18, in arguing that the Custodian violated OPRA in this regard. However, the custodian in Halper, 2004-130, received the complainant's OPRA request, which included an item for "immediate access" records, prior to departing for vacation. Further, in Colasante, GRC 2010-18, the Council determined that the custodian failed to comply with an interim order because he did not respond in a timely manner. Nearly two (2) months later, custodian's counsel advised the GRC that both the custodian and he were unavailable upon receipt of the Council's order. However, at no point did the GRC determine that the custodian had an obligation to designate a sub-custodian in his/her absence.

Additionally, even had the Council considered the custodian's failure to designate a sub-custodian to act in his absence, the evidence of record indicates that the Complainant and Complainant's Counsel both had at least some knowledge that the FFD designated Mr. Wickman as sub-custodian in March 2014, months prior to the subject OPRA request. Although the GRC agrees that best practices would dictate that the Custodian should have included some direction in his out-of-office message, the Complainant's Counsel was somewhat disingenuous in arguing that the Custodian "never designated another employee to receive/fulfill incoming OPRA requests . . ." See Complainant Counsel's letter brief, dated October 18, 2014, at 4.

Out-of-Office Messages

Regarding the out-of-office message, because same was nothing more than a general notification to any persons e-mailing the Custodian, it is clear on its face that such an e-mail would not be a sufficient response under OPRA. However, as noted above, best practices would dictate that a custodian include some additional information on submitting OPRA requests in his/her absence. Based on the facts of the instant complaint, the GRC declines to address whether the Custodian's out-of-office message resulted in an insufficient response.

In Camera Reviews

Regarding the Complainant's Counsel's request that the GRC perform an *in camera* review of e-mails not otherwise responsive to the request at issue here, Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) controls. Specifically, the Appellate Division required the GRC to conduct an *in camera* review of records that a custodian "asserts are protected when such review is necessary to a determination of the validity of a claimed exemption." Id. at 355. Further, "the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal." Id.

The Custodian's e-mails, from the moment he set up his out-of-office message until he claimed to have received the subject OPRA request on September 15, 2014, are not at issue here. Further, the Custodian could not have asserted that any of the e-mails were exempt because they were not sought as part of the subject OPRA request. Moreover, said e-mails are not necessary for the Council to make a determination in the instant complaint. The Custodian's response to the Interim Order will more than suffice in determining whether this complaint was ripe upon filing. Thus, the GRC declines to order an *in camera* review of those e-mails because they are not the subject of this complaint, the Custodian has not cited to any exemptions, and the e-mails are not necessary to the resolution of this appeal.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing

an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and

(2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The Complainant filed this Denial of Access Complaint, arguing that the Custodian failed to respond. However, the Custodian certified in the SOI that he did not receive the Complainant's OPRA request until September 15, 2014 (or the sixth business day after receipt of the request); thus, the statutorily mandated time frame had not expired at the time of the filing. The GRC subsequently determined that this complaint is not ripe for adjudication; thus, the Complainant has not achieved the relief sought.

Therefore, the Complainant has not achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus does not exist between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, this complaint was not ripe for adjudication because the Complainant filed same prior to the expiration of the statutorily mandated time frame and absent a response from the Custodian. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint: the Custodian had not denied access to any records responsive to the Complainant's September 10, 2014, OPRA request, because the Custodian did not receive the Complainant's request until September 15, 2014. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired. The instant complaint is therefore materially defective and should be dismissed. *See* Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009); N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011).

2. The Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, this complaint was not ripe for adjudication because the Complainant filed same prior to the expiration of the statutorily mandated time frame and absent a response from the Custodian. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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October 20, 2015